IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.368 OF 2004

Harinarayan Bajaj. ... Petitioner

vs.

Kirti J. Shah. .... Respondent.

Mr.Z.Andhyarujina with R.Waghani i/b. Dhru & Co., for Petitioner.

Mr.S.S.Purohit i/b. Purohit & Co. for Respondent.

CORAM: D.K.DESHMUKH,J.

DATED: 23rd August,2005

P.C.:-

1. By this petition, the petitioner challenges the Award passed by the Appellate Tribunal of the Bombay Stock Exchange. The original Arbitral Tribunal by majority Award has rejected the claim as not maintainable. The original Arbitral Tribunal by the majority Award has rejected the claim holding that the claim made by the Respondent being defaulter member is not maintainable. The second reason that was given was that in so far as the claim in respect of some of the

transactions could not have been made because they were carry forward transactions. The third reason that was given was that the respondent has not been able to prove the delivery of 1,30,200 shares of LIC Housing Finance Ltd. The appellate tribunal has set aside that Award by reversing the findings recorded by the original Arbitral Tribunal on three grounds. Before me it was submitted that even if it is assumed that the claim made by the defaulter was not maintainable and the findings recorded by the Arbitral Tribunal in relation to the Carry Forward Transactions, even if it is assumed to be correct, then also the Appellate Tribunal could not have made the Award directing the petitioner to make payment to the Respondent without applying mind to the discrepancies pointed out by the petitioner in the Statement of account on the basis of which the Respondent was claiming the amount. It was also submitted that the Appellate Tribunal is also not justified in reversing the findings recorded in the majority Award about the delivery of 1,30,200 shares of LIC Housing & Finance Ltd. On the other hand on behalf the Respondent, it is submitted that the Appellate Tribunal has also considered the minority Award and in the minority Award the discrepancies referred to by the petitioner in the statement of account have been considered. It was also submitted that in so far as the delivery of the shares of LIC Housing Finance Ltd. are concerned, the Appellate Tribunal has held that as the delivery memo is signed by the son of the petitioner and as

the petitioner had never made the claim in relation to those shares, the findings cannot be disturbed.

2. Now in the light of these rival submissions if the record is perused, it is clear that in the statement of case filed by the Respondent, the Respondent was claiming amount Rs.13,96,461.01 on the basis of his statement of account. The Petitioner had filed detail additional written statement before the Arbitral Tribunal. In his additional written statement, the petitioner had disputed correctness of various entries in the statement of account. By paragraph no.3 the petitioner disputed inclusion of credit amount of Rs.1,23,750/- By paragraph 4 the petitioner disputed the amount of opening balance shown in the statement of account. In the statement of account the opening balance shows amount of Rs.87,00,183.75, according to the petitioner it should have been Rs.85,63,933.75. In paragraph 5, the petitioner pointed out that the rates at which the shares of Sesa Goa Ltd. are shown to have been sold by the respondent by Bill no.102049 and 104061 are not correct. Perusal of the minority Award on which reliance is placed by the learned Counsel for Respondent shows that these discrepancies pointed out by the petitioner in the statement of account are not even referred to. Perusal of the Award of the Appellate Tribunal also shows that these discrepancies have not at all even referred to. Therefore, in my opinion, the learned Counsel for the

petitioner is right in submitting that the Award for payment of Rs.13,96,416.01 has been made on the basis of the statement of account submitted by the Respondent without application of mind by the Arbitral Tribunal to the discrepancies pointed out by the petitioner in that statement of account. It is further to be seen here that so far as the aspect of delivery of shares of LIC Housing Finance Ltd. are concerned, in the majority Award in paragraph 12 the original Arbitral Tribunal has observed thus:-

> "12. Then there was a question about the delivery of 130200 shares to the Respondent. The Respondent denied this fact. Reliance was placed for applicant on delivery list wherein there is a mention of delivery of 130200 shares to one Rahul who is alleged to have signed it. The signature of Rahul is denied by the Respondent. There is no proof by the applicant. There is also no proof of the fact that Rs.1,36,250/- is the amount of dividend as alleged by the Applicant."

Perusal of the above quoted paragraph of the majority Award of the original Arbitral Tribunal shows that the Arbitral Tribunal has recorded the findings that the Respondent had not proved the delivery of those shares to the petitioner because the petitioner had denied that on the

delivery memo the signature of his son Rahul appears and that the respondent had not led any evidence to show that the delivery memo was signed by the Son of the petitioner. Perusal of paragraph 3 of the Award made by the Appellate Tribunal shows that this aspect of the matter has been totally lost sight of by the Appellate Tribunal. The relevant observations of the appellate tribunal are contained in paragraph 3 reads as under:-

> "3. In connection with the delivery of 130200 shares of LIC Housing Finance Limited, the Respondent has denied that these shares were delivered to the Respondent whereas the Appellant has produced the documents which substantiate and prove objectively that these shares were delivered on 27.1.1999 to one Mr.Rahul Bajaj – son of the respondent. Further, it is noted that inspite of the averment that the said shares were not delivered, the respondent had not demanded the same from the appellant. In view of the same, we are inclined to accept the contentions raised by the Appellant that the said shares were delivered by the Appellant to the Respondent on the instructions of the Respondent himself

to his son Mr.Rahul Bajaj."

Perusal of the above quoted observation shows that the Appellate Tribunal has totally ignored the fact that the petitioner had denied that the delivery memo was signed by his son and that there was no evidence led by the Respondent to show that the delivery memo was signed by the Son of the petitioner. In my opinion, the findings about the delivery of those shares merely on the basis of inference that because the petitioner has not raised any claim in relation to those shares, it must be assumed that he has received the shares, could not have been recorded. The tribunal should have seen that from the conduct of the petitioner of not raising any claim in relation to those shares more than one inference could be drawn, though it is true that one of the inferences that could have been drawn is that the shares were delivered. A tribunal can record a finding of fact based solely on inference drawn from the conduct of the parties if the inference is the sole inference that can be drawn. Thus, I find that in substance the Award made by the Appellate Tribunal suffers from non application of mind to vital aspects of the matter, and therefore, it is liable to be set aside. In the result therefore, the petition succeeds and is allowed. The Award impugned in the petition is set aside. The respondent is directed to pay costs of this petition as incurred by the petitioner to the petitioner.